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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1053

THE HONORABLE R. DORSEY WATKINS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND,

Petitioner,

and

THE FIRESTONE TIRE & RUBBER COMPANY,

Intervenor,

vs.

THE GENERAL TIRE & RUBBER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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February 17, 1967.

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RESPONDENT'S BRIEF IN OPPOSITION.

By a unanimous *en banc* decision, the United States Court of Appeals for the Fourth Circuit on January 12, 1967 entered a writ of mandamus directing petitioner, The Honorable R. Dorsey Watkins, District Judge for the District of Maryland, to transfer Civil Action No. 12,932 to the United States District Court for the Northern Dis-

trict of Ohio, Eastern Division. Respondent, The General Tire & Rubber Company, prays that the Court deny intervenor's petition for certiorari.

In the preceding paragraph, General Tire has been referred to as the respondent and Judge Watkins as the petitioner. The intervenor is Firestone. These references are based on the caption of the case in the Court of Appeals which, pursuant to Rule 31 of that Court, named General as petitioner, Judge Watkins as respondent, and Firestone as intervenor. The caption of the Petition for Certiorari is incorrect and should read as shown on this brief. Judge Watkins has not personally petitioned for certiorari, but he remains the nominal petitioner, and Firestone's status, granted by Rule 31 of the Court of Appeals, remains that of intervenor.[1]

STATEMENT OF THE CASE.

Firestone has set forth a statement of the case which is slanted and incomplete. Rather than burden the Court with a restatement of the case, however, respondent relies upon the detailed background set out in the opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1a).[2]

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1. The pertinent portion of Rule 31 is as follows:

"2. Where the purpose of the writ is to review a decision of a District Judge, he will not be required to file an answer or submit a brief, and his failure to do so will not be deemed an admission of any allegation in the petition. Each prevailing party in the District Court will be treated as an intervenor and shall not be required to submit a formal motion to intervene."

2. "Pet. App. ....." refers to the appendix attached to the Petition for Certiorari.

ARGUMENT.

The fact that transfer was ordered by the unanimous opinion of the Court of Appeals, sitting *en banc,* after the trial in Civil Action 12,932 had proceeded more than two years is dramatic evidence of the nature of the events in this case which had occurred at the level of the District Court. Firestone's actions before that Court had constituted an extraordinarily successful abuse of judicial process and interference with the administration of justice.

1. BACKGROUND.

Civil Action No. 12,932, the Baltimore litigation, began in March, 1961, three months *after* the Cleveland suits against The Goodyear Tire & Rubber Company and U. S. Rubber Company were filed by General Tire (Pet. App. 3a-4a). After the District Judge had refused in July, 1961 to transfer the Baltimore case to Cleveland, where a consolidated trial could be had (Pet. App. 4a), he was imposed upon by an unseemly, but successful attempt by Firestone to push the Baltimore case to trial before the Cleveland trial could begin. The progress of the earlier-filed Cleveland cases was impeded by the unfortunate continuing illness and subsequent death of Judge McNamee, to whom those cases had been assigned.

Each attempt by respondent to secure effective pretrial designed to narrow and clarify the issues was met by a charge from Firestone that respondent was merely stalling for time to advance the Cleveland litigation. The recommended procedures for protracted cases (Prettyman Report, 13 F. R. D. 62) were not followed or even attempted,

and *no* effective pretrial conference was ever had to narrow or clarify the issues. For example, despite General Tire's repeated requests, Firestone was never required to reduce the 125 prior art references and 61 alleged prior uses, nor to state what, if anything, each added to the other, nor even to state the relative order of their importance, although such reduction and statements are usually a matter of course.

The result of the inadequate and disorganized preparation for trial has been that the trial itself has been an endless discovery proceeding which has been fantastically expensive for respondent and which has unnecessarily clogged the docket of the District of Maryland and wasted nearly three years of judicial effort. To put it simply, the trial in Baltimore was completely out of control. The expected completion date grew farther away with time, not closer. For example, as General pointed out in its argument before the Court of Appeals, Firestone's latest prediction of the expected trial time remaining merely for its own testimony is longer than the time it predicted the entire trial would take in 1963 and even longer than its revised prediction made to the Court of Appeals in February, 1966. Another example of the loss of control in Baltimore is that as of the suspension of the trial the District Court had listened to 38,297 pages of record, a major portion of which was devoted to the issue of patent validity, an issue tried before Judge Holtzoff (pursuant to 35 U. S. C. § 145) in six days. *General Tire & Rubber Co.* v. *Watson*, 184 F. Supp. 344 (D. C. D. C., 1960).

2. JUDICIAL TIME WILL BE SAVED BY TRANSFER TO CLEVELAND.

In contrast to the chaos in Baltimore, the procedures being followed in Cleveland are calculated to greatly simplify the issues and reduce trial time. The recommended procedures for protracted cases are being followed meticulously, as can be seen from the pretrial order set out in the appendix to General Tire's reply brief filed in the Court of Appeals. In addition, the District Judge in Cleveland has acquired a good familiarity with the case by visits to rubber and tire making plants, by reading extensive briefs, and by his presiding over many pretrial conferences.

Trial was set in Cleveland for the *General* v. *U.S. Rubber* case for March 1, 1967, the *General* v. *Goodyear* case having been settled in February, 1966, with that District Judge's valuable and active assistance. A pretrial conference is presently set for April 3, 1967, at which time the question of consolidation is scheduled for discussion with Firestone and U. S. Rubber, if transfer has been effected by that date, and on April 3, 1967 the setting of a new trial date is also on the agenda.

Contrary to Firestone's representations, General Tire represents that the trial in Baltimore would have continued into 1968. In Cleveland, on the other hand, General Tire expects an effective narrowing of issues and pretrial agreement on documents and marking of exhibits so that the entire trial will take less time than it would have taken to finish in Baltimore. This will also make possible an effective appeal with a much less cumbersome record to present to the appellate courts. An effective appellate review of a 38,000 page wandering record and a presumably correspondingly lengthy trial court opinion is nearly impossible. Such a trial and appellate review, in an essentially simple patent case such as this, does not provide the just, speedy,

and inexpensive trial all litigants are promised by Rule 1, F. R. C. P.[3]

3. THE DECISION OF THE COURT OF APPEALS PRESENTS NO ISSUES REQUIRING REVIEW BY THIS COURT.

The opinion of the Court of Appeals clearly sets forth its own justification. General Tire considers it need only briefly outline the reasons the decision presents no issue requiring review by this Court. Under all of the veneer, Firestone's petition is no more than a plea that the Court of Appeals was wrong. It is to this contention that this brief is addressed, since there are clearly *no* conflicts with any decision of other Circuits or this Court, *no* constitutional question, and *no* overriding question of public importance.

a. The Court of Appeals Was Clearly Acting Within Its Discretionary Powers in Issuing the Writ.

The Court of Appeals correctly held that the question of its "naked power" to issue the writ of mandamus, pursuant to 28 U. S. C. § 1651(a), was beyond dispute. *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1956). *LaBuy* specifically so held at 255. Likewise, the power of Courts of Appeals to review transfer of cases by writ of mandamus has been accepted, at least *de facto*, by this Court in *Koehring Co.* v. *Hyde Construction Co.*, 382 U. S. 362 (1966); *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964); *Hoffman* v. *Blaski*, 363 U. S. 335 (1960); *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955); and *Ex parte Collett*, 337 U. S. 55 (1949).

There is no unseemly confusion among the Circuits on

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3. Rule 1 provides:

"These rules govern the procedure in the United States district courts in all suits of a civil nature. . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action."

the question of transfer review by mandamus, contrary to Firestone's contentions. The fact and law are and should be that mandamus can be granted in unusual cases, *such as the present.* It is also an essential safeguard against injustice, as this case demonstrates, and the Court of Appeals has inherent power to remedy a gross injustice independent of and in addition to its power to review transfer decisions.

The Court of Appeals was careful to point out that it was issuing the writ of mandamus because of its interest in the "effective administration and supervision of the courts of our circuit" (Pet. App. 18a). The Court went on to say, "It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done" (Pet. App. 18a). Thus, the instant case comes squarely within the principles of *LaBuy.* It is the unanimous *en banc* action of seven judges exercising their collective discretion in the proper supervision of the lower courts, among other reasons:

> "to prevent an extravagantly wasteful and useless duplication of the time and effort of the federal courts by the simultaneous trial of two complex and elaborate cases involving substantially the same factual issues." (Pet. App. 2a).

Such supervisory action over the lower courts should be left primarily to the discretion of the Courts of Appeals of the various Circuits. As this Court said in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952), affirming a Court of Appeals' reversal of a District Court:

> "The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. The conclusion which we are asked to upset derives from an extended

> and careful study of the circumstances of this litigation . . . Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours."

Firestone complains that the Court of Appeals considered factors which were not of record and which were not properly before the Court. This point has no validity whatever. The entire history of General's various transfer efforts was before the Court of Appeals by way of General's renewed motion to transfer. On June 28, 1966, General renewed both its original motion to transfer dated April 13, 1961 and its renewed motion of September 6, 1963 (Appendix to General's petition before the Court of Appeals, p. 92). The September 6, 1963 motion was reviewed by the Court of Appeals by mandamus, *General Tire & Rubber Co.* v. *Watkins,* 326 F. 2d 926 (1964). Thus, *all* of General's contentions and Firestone's responses relating to transfer were before the Court of Appeals. Indeed, the Court did review contentions passed on at the first transfer mandamus and presumably reviewed the voluminous record submitted therewith which included documentation regarding convenience of the parties and witnesses.

There were two factors not presented to the Court on previous transfer attempts: one was the fact of the McCreary settlement and the other was the impending concurrent trial of the same issues in Cleveland (Pet. App. 3a). There can be no dispute concerning these facts, however, and Firestone has not denied them.

It is clearly apparent to General Tire that the action of the Court of Appeals in issuing the writ of mandamus was not a hasty, rash, or arbitrary decision, but rather very carefully considered. The Court of Appeals has indeed been "extremely reluctant to exercise its authority" to entertain petitions for mandamus (Pet. App. 6a). It denied

three prior mandamus petitions by General Tire *in this case,* and it is General's belief that this is the first instance in which the Fourth Circuit has ordered a case transferred by writ of mandamus. The Court of Appeals' action, *en banc,* was certainly not lightly undertaken.

Firestone cites *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U. S. 240 (1964) as authority for the proposition that the Court of Appeals should have remanded the case to the District Court rather than directly order the District Court to transfer. *Platt* is inapposite in that it arose under Rule 21(b) of the Federal Rules of Criminal Procedure and not 28 U. S. C. § 1404(a) and in that this case, unlike *Platt,* involves the general supervisory powers of the Court of Appeals over lower courts, pursuant to 28 U. S. C. § 1651(a), as well as the question of review of transfer, pursuant to 28 U. S. C. § 1404(a). Firestone, in its petition, erroneously attempts to confine the Court of Appeals to a simple Section 1404(a) analysis, even though it is patently apparent that this case involves many other factors relevant to the Court of Appeals' supervisory powers. Firestone avoids mention of the explicit requirement of Section 1404(a) that the "interest of justice" should be a prime consideration in transferring an action; the "just" determination intended by Rule 1, F. R. C. P.; or the implicit requirement of Section 1651(a) that the Court of Appeals has the right and duty to assure that justice is not abused in the courts of its circuit. The documentary background of this case set out in the opinion of the Court of Appeals clearly establishes that Firestone has not been pursuing justice in the District Court and that justice has not been done there, either with respect to the parties or to the mass of other litigants in Baltimore who were denied trial during the pendency of this trial.

That there is no conflict between the present case and *Platt* is further evidenced by the fact that this Court has

held that under proper circumstances, a Court of Appeals *on a mandamus petition* has the power to directly transfer a case pursuant to 28 U. S. C. § 1404(a) without going through the formality of ordering the District Court to transfer. *Koehring Co.* v. *Hyde Construction Co.*, 382 U. S. 362 (1966). At 364 of *Koehring* this Court distinguished the *Platt* decision.

Other recent cases in which Courts of Appeals have directed District Courts to transfer cases after finding an abuse of discretion in not transferring include *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299 (7th Cir. 1955) *cert. den.*, 350 U. S. 822 (1955); *Southern Railway Co.* v. *Madden*, 235 F. 2d 198 (4th Cir. 1956) *cert. den.*, 352 U. S. 953 (1956); *Koehring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295 (5th Cir. 1963); and *Chicago, Rock Island & Pacific Railroad Co.* v. *Hugh Breeding, Inc.*, 247 F. 2d 217 (10th Cir. 1957) *cert. dismissed*, 355 U. S. 880 (1957). *Igoe* was on mandamus.

b. The Factors Considered by the Court of Appeals in Ordering Transfer Are Well Supported by Precedent.

Two important factors considered by the Court of Appeals in ordering transfer were the forum shopping tactics of Firestone and the desirability of litigating multiple suits involving the same issues in one tribunal. Forum shopping by the plaintiff has been held to be an important factor in granting a defendant's motion to transfer in *Clayton* v. *Warlick*, 232 F. 2d 699 (4th Cir. 1956); *Polaroid Corporation* v. *Casselman*, 213 F. Supp. 379 (D. C. N. Y. 1962); and *Thompson* v. *Capital Airlines, Inc.*, 220 F. Supp. 140 (D. C. N. Y. 1963). Of course, the factor of plaintiff's choice of forum, which blinded the District Court is no longer entitled to the dominance it had under the common law doctrine of *forum non conveniens*,

especially where plaintiff's choice, as here, is tainted with improper and fraudulent tactics. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955).

The factor of the desirability of litigating multiple claims in one tribunal is emphasized by a host of recent decisions. *Axe-Houghton Fund A Inc.* v. *Atlantic Research Corp.*, 227 F. Supp. 521 (D. C. N. Y. 1964); *Atlantic City Electric Co.* v. *I-T-E Circuit Breaker Co.*, 247 F. Supp. 950 (D. C. N. Y. 1965); *Wilson* v. *Ohio River Co.*, 234 F. Supp. 283 (D. C. Pa. 1964); *Roberts Bros. Inc.* v. *Kurtz Bros.*, 236 F. Supp. 471 (D. C. N. J. 1964); *Color Technique, Inc.* v. *Don Wallace, Inc.*, 241 F. Supp. 952 (D. C. Ill. 1965); *Freiman* v. *Texas Gulf Sulphur Co.*, 38 F. R. D. 336 (D. C. Ill. 1965); *I-T-E Circuit Breaker Co.* v. *Becker*, 343 F. 2d 361 (8th Cir. 1965); *I-T-E Circuit Breaker Co.* v. *Regan*, 348 F. 2d 403 (8th Cir. 1965). In the present case, General Tire has suits pending in Cleveland against U. S. Rubber Company, The Firestone Tire & Rubber Company, The B. F. Goodrich Company, Carroll Tire, Inc., and The Mohawk Rubber Company, all involving the same basic issues.

A factor clearly implied, if not stated, by the Court of Appeals is that a speedier trial could be had in Cleveland. This factor has also received widespread approval by the courts. *Axe-Houghton Fund A, Inc.* v. *Atlantic Research Corp.*, 227 F. Supp. 521 (D. C. N. Y. 1964); *Haase* v. *Gilboy*, 246 F. Supp. 594 (D. C. Wisc. 1965); *I-T-E Circuit Breaker Co.* v. *Regan*, 348 F. 2d 403 (8th Cir. 1965); and *Ebel* v. *Spencer Chemical Co.*, 227 F. Supp. 956 (D. C. Mo. 1964).

Also, the Court of Appeals properly emphasized the fact that Firestone's co-plaintiff had settled since the first two motions to transfer were decided and that no serious argument could possibly be made now that Cleveland was not the most convenient forum by far. On the question of the convenience of witnesses alone, General represents that approximately 155 days of testimony were taken in Balti-

more from witnesses located in the Cleveland area compared with approximately six days of testimony from witnesses located in the Baltimore area.

The factors considered by the Court of Appeals were summarized in its statement at Pet. App. 14a that:

> "We think the district court erred in its failure to weigh the impelling need for efficiency in the administration of our court system against the right of Firestone to continue the trial in a forum which no longer offered to it any convenience over the Ohio forum."

4. THE FRAUD ISSUE.

General's position is that the written words and recorded statements of Firestone and its counsel set out in the Court of Appeals' opinion establish unclean hands and fraud *per se*. The primary authority for General's contention that the fraud practiced in connection with the first transfer motion in itself justifies a granting of relief to the prejudiced party on a renewed motion to transfer is *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944).

Firestone's complaint that it is prejudiced by a transfer after 38,000 pages of record is indeed presumptuous. It is General Tire that has been prejudiced by having to defend, during almost three years of trial, a case which, but for Firestone's fraudulent and improper conduct, should have been transferred in July, 1961 for trial with the pending Cleveland cases.

Firestone refers to the negative findings of the District Court on the question of fraud, but this question has yet to be ruled on by the Court of Appeals or this Court. It also should be noted that, even though in the third mandamus opinion (363 F. 2d 87, 90), the Court of Appeals had suggested that Firestone "may have practiced a serious fraud

upon the District Court" and suggested a renewed transfer motion, the District Court made no investigation whatever concerning the fraud. Firestone's counsel was not asked a single question by the Court concerning an explanation of the agreement charged to constitute a major part of the fraud, though this was suggested by counsel for General (Appendix to General's Petition before the Court of Appeals, pp. 97, 101). The result of this neglect on the part of the District Court to seek an explanation of Firestone's conduct was that the Court of Appeals itself examined Firestone's counsel on this point in open court at the argument on the mandamus petition. Relevant portions of this argument are reproduced in the appendix to this brief, at 2a-8a. In its opinion in the third mandamus action (363 F. 2d 87, 90), the Court of Appeals had suggested the possibility of its review of the renewed transfer motion. This unusual statement, plus the fact that an *en banc* hearing was granted in the present case, illustrates the concern of the Court of Appeals with the "interest of justice" and its realization that its supervisory powers under Section 1651(a) might have to be exercised.

The bare recital of Firestone's outrageous conduct set out in the opinion of the Court of Appeals in the form of memoranda and recorded words of Firestone and its counsel establishes, in General's opinion, a fraudulent imposition on General and the Court without precedent and clearly sufficient to require a dismissal of Firestone's declaratory judgment action. Much less then is Firestone entitled to complain here that its scheme to keep the case in Baltimore has been thwarted. Its conduct has been worse than that condemned by this Court in *Hazel-Atlas, supra,* and *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.,* 324 U. S. 806 (1945).

General is well aware of this Court's record in recognizing and remedying fraud where lower courts have found none,

Mammoth Oil Company v. *United States*, 275 U. S. 13 (1927) (the "Teapot Dome" case), and therefore, would ordinarily welcome a review of the fraud issue by this Court. In view of the Court of Appeals' decision, however, General believes this issue is not now ripe for independent review by this Court.

CONCLUSION.

No reasons have been presented to show why this Court should review the decision of the Court of Appeals. Certiorari should be denied.

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RESPONDENT'S APPENDIX.

PORTION OF ARGUMENT BEFORE COURT OF APPEALS.

(December 5, 1966.)

* * * * *

Mr. Merriam (For General Tire):

Our position on the law is quite simple, that the main question is, did Firestone present a real agreement or did it cite facts based upon a real agreement to this Court that were a sham, and of that there is no question from the tape. Judge Watkins based his opinion against us on the ground that there were no conflicts between Mr. Clark and himself, on the ground that McCreary was independent, and on the ground that I had not developed what the secret agreement was. The burden was put on me to find it out. I don't think it is material.

Mr. Irons was in court. He volunteered to be my witness, and he said even Mr. Clark's words were binding on me although he was an officer of the company.

I told the Court that this was a fraud on the Court, perhaps; that if it was a fraud I expected the Court to use his full powers of investigation and not make Mr. Irons my witness. I suggested that the Court might examine him if he wished. And that was the end of it. The Court did not examine Mr. Irons. He did nothing to investigate. The whole burden was put on me to find out from the mouths of my opponents what had been done.

Now, to me the documents are conclusive. The law of the Girardi case, as we pointed out in our brief, is that we don't expect conspirators to go up on the corners and

announce to the world what they did, but judge by the facts and the circumstances. We have done more than any case that I know of in producing those circumstances.

Judge Haynsworth: Thank you, sir.

Mr. Irons?

Mr. Irons (For Firestone): If the Court please, I don't think that Mr. Merriam has said anything that he did not say in his brief and which I think I have answered in mine. So I am going to make my comments rather brief and to the point about some of the things he did say.

Judge Haynsworth: I don't think he said a thing that wasn't in his brief, either, but maybe you can say something that wasn't in your brief.

On this tape Mr. Birch said he was relaying a message from you?

Mr. Irons: Yes, sir.

Judge Haynsworth: And he didn't know what it meant?

Mr. Irons: Yes, sir.

Judge Haynsworth: Can you tell us what it meant?

Mr. Irons: Yes, sir. I will answer your question as best I can, and when I finish I would like to make a comment not by way of explanation of what I say. I want to advert to this tape and do the best I can to answer the question.

I am looking for the transcript of the tape in this appendix.

Judge Haynsworth: Page 35.

Mr. Irons: Thank you.

Judge Winter: Appendix 35 of the Petition.

Mr. Irons: I might say that in my brief the questions which were raised by Mr. Merriam are in effect answered on the record, but I want to answer this anyway.

Mr. Birch said, at page 36:

> "Now, here is what we'd like to do, if it's all right with you, with full recognition that the agreement that was made between you and Stanley Clark is not going to, in the long run, change one tiny little bit." And he went on to say, "After this is all over with, why, everything will come out in the wash."

The question which has been posed by Mr. Merriam is, what is the agreement that was made between you and Stanley Clark which was not going to change one little bit, and what is it that was going to come out in the wash? I will answer that question.

Judge Watkins' Opinion reflects there was an understanding reached about the date the suit was filed that Firestone would carry the bulk of the expenses in this litigation. Plaintiffs' Exhibit 1836 shows that Mr. McCreary was advised that he would have to pay his way.

Now, as Mr. Clark also testified, which is at page 72 of the Intervenor's transcript, we did not have at that time any specific basis on which the payment of fees was going to be apportioned, and Mr. McCreary wasn't advised of any, and we didn't tell him of any or discuss it with him.

Judge Haynsworth: If there was no understanding, what was the agreement with Mr. Clark that was not going to change one tiny little bit?

Mr. Irons: That Firestone would carry the bulk of the expenses in the litigation.

Judge Haynsworth: It was not that they were going to pay them all?

Mr. Irons: No, Your Honor, it was not.

Judge Haynsworth: Well, then, why the suggestion "The agreement is not going to change one tiny little bit"? And at the end "It will all come out in the wash"? "We are going to bill you for one per cent of the charges."

Mr. Irons: What I want to answer about that is in the context of what Mr. Birch said it is something I told him to say, and it is this: The proposition which was offered to Mr. McCreary at that time was that he would pay one per cent because one per cent was the relative production basis. All right?

Judge Haynsworth: That's consistent with the general understanding that Firestone would pay the bulk of the expense, 99 per cent.

Mr. Irons: All right.

Judge Haynsworth: But he says now this isn't going to change the agreement you have with Mr. Clark one tiny little bit. Your explanation is that it fixes an unspecific understanding.

Mr. Irons: My explanation is not finished yet, Your Honor.

Judge Haynsworth: All right, sir.

Mr. Irons: I want to come to the "It will all come out in the wash" part and why the telephone call was made. I am going to answer the second question first.

The phone call of May 9th was made to fix a basis for billing Mr. McCreary on a percentage basis.

Now, "Everything will come out in the wash." As I can best recall it, Judge Haynsworth, I had some preliminary concern about this because I knew there would be many, many months—Our firm bills on a monthly basis. The record shows McCreary was billed that way. There would be many, many months when we would not work at all for McCreary and we would still send McCreary a bill. There would be other months when one per cent wouldn't come close to perhaps the time we had spent working for McCreary that month, and it was in that context, as far as what I meant, at the time I communicated to Mr. Birch that everything would come out in the wash, that

these bills would balance out over a time period as the suit went along. And we suggested that if we went on this one per cent basis and billed on a monthly basis one per cent, there would be—this is not on the tape. This is what you asked me for, my explanation.

Judge Haynsworth: Yes, sir.

Mr. Irons: That's what I meant. If I said it in words or substance to Mr. Birch, this is what I meant and what motivated it, that there would be some months when we do no work for McCreary and bill them.

Judge Haynsworth: And in your practice I suspect with your clients, you have an understanding about fees like this, you write them a letter, don't you?

Mr. Irons: I don't think I have ever written a client about a fee arrangement. I am quite serious about that. There may be exceptions but I don't think of any.

Judge Haynsworth: Perhaps you don't. You have an understanding about it but you don't say, "I don't want to talk about it too much for obvious reasons or put anything in the mail."

Mr. Irons: I don't want to evade that one, either. Mr. Birch said that he did not recall that I said that. He said that he didn't want to talk about the firm's billing. That's his recollection. I don't recall that I said any such thing to him.

Judge Haynsworth: But isn't this a fact, that it is in the tape, "I don't want to put anything in the mail and I don't want to talk about it too much for obvious reasons"? Doesn't that strongly suggest that the understanding was pretensive?

Mr. Irons: I don't think it does at all. I don't agree with Your Honor on that point at all.

Judge Haynsworth: Well, I am asking you whether

or not it doesn't suggest it because I want to hear what you have to say. I am not saying that I have any conclusion in my mind but these questions do arise in my mind when I read this tape.

Mr. Irons: Quite properly.

Now, I want to say flatly that, of course, the agreement was not pretensive, and I want to come back to that. This business about not wanting to put anything in the mail, as I said, I don't have any present recollection of why I said it or whether or not I said it to Mr. Birch, but if I said such a thing, my own judgment about it would have been that this was in the context of litigation and I didn't want to create any more documents than were necessary, not because there was anything to hide at all but just because this is a practice we normally follow in litigation situations, and we do not write a lot of papers which are unnecessary, and I don't know that I have said it or thought it at that time—I am talking about some effort to reconstruct—on December 5, 1966, why I may have said such a thing.

Judge Haynsworth: And yet, offhand, wouldn't it seem that if there had been a general understanding that Firestone would pay the bulk of the expense, that McCreary would pay a fair share, that you would specify the understanding so that you would know exactly what would be billed and this is what we will put it on?

Mr. Irons: I don't want to argue with you, Judge Haynsworth. It was not done. But McCreary did pay one per cent of the expense up until the time the lawsuit was settled.

Judge Haynsworth: This is what was agreed upon here.

Mr. Irons: That's right. And McCreary settled, Mr. Merriam told Judge Watkins, for $100,000, and we didn't pay the bill and we aren't holding McCreary harmless, and there is no secret agreement.

To the extent that there is an adverse inference to be drawn from the comment about putting something in the mail, it is unfortunate because there is no fact or evidence—

Judge Haynsworth: Well, it starts out with about the first thing, "The reason I wanted to call you is that we want to avoid any inference that you are our little patsy, and the way to avoid it is to bill you for one per cent in the course of each month."

Mr. Irons: Yes, Your Honor, because the fact was that McCreary was (A) independent, was (B) paying its own way, was (C) not held harmless.

Judge Haynsworth: At this time it wasn't.

Mr. Irons: This time is May 9, 1961.

Judge Haynsworth: Yes, I know.

Mr. Irons: On March 30, 1961, Mr. McCreary in Defendant's Exhibit 1836 had been told two things: One, that he would have to pay his own way and, two, that if he lost, we lost, and he wasn't going to be held harmless. At that point in time there had been no arrangement made as to how the fees were going to be divided. That remained to be done.

Frankly, our office overlooked, and it is probably I overlooked billing McCreary at the end of March. This was March 30th, our billing time for April came up early in May. It was necessary at that time to decide upon how McCreary was going to be billed. I am quite sure that's why that telephone call was made, and Mr. Clark himself said as to why the call was made, he supposed it was for that reason.

Now I want to come back to where I was about this "patsy" business. McCreary was not a patsy; McCreary was independent. McCreary did not have a hold harmless, McCreary was paying its own way, and if we were

ever asked, I wanted to be able to show that we had, in fact, implemented this, which was in fact the agreement pursuant to which McCreary was paying its own way. That's why I wanted to bill them. That's why we did bill them just like we bill anybody else.

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Judge Craven: What's happening in Ohio? Is the trial still proceeding in Baltimore or is the trial going on in Ohio?

Mr. Irons: This brings up another very interesting question. I want to answer that.

What's happening in Ohio, as I understand it, specifically, is that the trial of the U. S. Rubber case has been scheduled to begin I think it is on March 1st. Judge Craven, subject to correction.

To answer your other specific question, yes, the trial is still going on in Baltimore. Mr. Merriam said in his opening brief he couldn't predict how long the trial was going to go on in Baltimore. He got more knowledgeable in his reply brief and he said that he thought it was not going to end until 1968.

I filed this morning a supplemental appendix. All it contains with one exception is pertinent portions of the record of the proceedings before Judge Watkins on November 29, on which day I reported, pursuant to direction from Judge Watkins, my own best estimate of how long it would take us to conclude our case. Mr. Merriam when I got through said that he thought two weeks, and I think my minimum estimate was 48 days and a maximum of 67 for the plaintiffs' case. Based on that, Judge Watkins spoke in terms of hearing argument about the end of September and having briefs submitted before that.

Now, that's what the record is on where the case is in Baltimore.

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Mr. Merriam: May I have a few minutes?

Judge Haynsworth: Mr. Merriam.

Mr. Merriam: In the first place, the question as to the scope of the other case that Judge Craven asked about, when this case was first up here, Mr. Howard said on page 4 of what I have here as a supplemental appendix, that the whole case would take three months. When it was up here last February, Mr. Irons said that it should be over by June. He has now told Judge Watkins, leaving out the German witnesses who haven't been finished, leaving out my rebuttal, and assuming that cross-examination would be on a one-to-one ratio, or as it has been, three to six in the case, that he will take 68½ days.

I said I had two weeks as of now, and I hadn't heard of 68½ days of rebuttal, and based on this kind of history I can't say that the case will be over any earlier than I said before.

So far as Mr. Irons' statement of the case is concerned, which of course is entirely new to me, I have nothing to add to the questions which the Court asked of him. I don't think it makes a consistency, but I will point out that the record itself shows that McCreary had work done for it and it alone in March, when Mr. Irons had a plane go up to Indiana, Pennsylvania, with Mr. Birch to tape record a conversation with Mr. Earnheart, not to Mr. Earnheart's knowledge. If the situation had been as Mr. Irons said it, it does not make sense with the rest of the documents.